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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 501

HUGHES TOOL COMPANY, *Petitioner*,

v.

TRANS WORLD AIRLINES, INC., THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

This case is a companion case to No. 443. In this case, certiorari was granted to petitioner Hughes Tool Company ("Toolco") to review a judgment of the Court of Appeals for the Second Circuit which affirmed the dismissal with prejudice of counterclaims, seeking damages amounting to $366 million and other relief, filed by Toolco on its own behalf and derivatively on behalf of Trans World Airlines, Inc. ("TWA") in the District Court for the Southern District of New York. Named as additional defendants on the counterclaims are: The Equitable Life Assurance Society of the United States ("Equitable"), Metropolitan Life Insurance Company ("Metropoli-

tan"), Irving Trust Company ("Irving"), Ernest R. Breech ("Breech"),[1] Dillon, Read & Co., Inc. ("Dillon, Read"), Ben-Fleming Sessel ("Sessel"), James F. Oates, Jr. ("Oates"), Harry C. Hagerty ("Hagerty") and Charles C. Tillinghast, Jr. ("Tillinghast").[2]

OPINION BELOW

The District Court did not file a separate opinion on the dismissal with prejudice of the counterclaims. It simply ordered their dismissal, as to the additional defendants, in a brief order, for the reasons set forth in its opinion relating to the complaint. (AA-206)[3] As to their dismissal with respect to TWA, there

[1] Breech did not become in fact a party to the proceedings below and is not a party to the proceedings in this Court.

[2] Proceedings relating to the complaint, captioned "Hughes Tool Co. and Raymond M. Holliday, Petitioners v. Trans World Airlines, Inc., Respondent" are the subject of No. 443 in this Court. In that case, this Court is reviewing the decision of the Court of Appeals on interlocutory appeal from the order of the District Court granting a default judgment on the complaint after denying Toolco's motion to dismiss the complaint. The Court of Appeals limited the grant of interlocutory appeal in that case to the questions whether the District Court had jurisdiction of the action stated in the complaint and whether the exercise of its regulatory powers by the Board constituted a good defense to the antitrust claims of the complaint.

[3] References to "AA" are to Toolco's printed appendix in the Court of Appeals in this case, now vol. I of the printed record in this Court as to this case. References to "B" are to the printed Court of Appeals appendix of the present respondents (other than TWA) in this case, now vol. III of the printed record in this Court as to this case. References to "A" are to Toolco's appendix in the Court of Appeals in No. 443, now vols. I & II of the printed record in this Court as to No. 443. References to "R" are to the additional material in this case and in No. 443 printed in this Court (vols. IV, V & VI). References to "f" are to unprinted portions of the original record.

was simply a brief reference in the opinion as to the complaint. (AA-204) The District Court opinion relating to the complaint (AA-200-205) is reported at 32 F.R.D. 604. The opinion of the Court of Appeals is reported at 332 F. 2d 602. (R. 1413)

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1964. (R. 1439) A petition for rehearing was filed on June 17, 1964 and denied on July 6, 1964. (R. 1440-56) The petition for a writ of certiorari was filed on September 14, 1964, and granted on November 16, 1964. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was the District Court correct in ordering the dismissal with prejudice of petitioner's counterclaims:

(a) where jurisdiction over the subject matter of the counterclaims was confided to the Civil Aeronautics Board which had not resolved the issues raised by the counterclaims at the time of the dismissal?

(b) where, even if the jurisdiction of the District Court over the subject matter of the counterclaims was not superseded by that of the Board, petitioner took a justifiable position not to proceed on the counterclaims and there was no showing that the respondents would have been prejudiced by a dismissal of the counterclaims without prejudice?

(c) where the dismissal with prejudice appears to be punitive rather than remedial and no proceeding was had giving petitioner an opportunity to be heard as to the nature or scope of any relief adequate to the protection of respondents?

2. Was the District Court correct in dismissing with prejudice, for conduct attributable to the suing stockholder, a counterclaim brought derivatively on behalf of TWA without giving notice to the minority stockholders of TWA under Rule 23(c) of the Federal Rules of Civil Procedure?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment of the Constitution provides: "No person shall . . . be deprived of . . . property without due process of law."

The statutory provisions involved are §§ 102, 408, 411 and 414 of the Federal Aviation Act of 1958, as amended, 72 Stat. 731, 74 Stat. 901, 49 U.S.C. §§ 1302, 1378, 1381, 1384; §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2; §§ 4 and 7 of the Clayton Act, as amended, 38 Stat. 731, 64 Stat. 1125, 15 U.S.C. §§ 15 and 18.

The Federal Rules of Civil Procedure ("Rules") involved are 23(a) and (c), 37 and 41.

The above-cited statutory provisions and Rules are reprinted in the Appendix, pp. 1a-13a, *infra*.

STATEMENT OF THE CASE

Description of the Parties

Toolco is a Delaware corporation primarily engaged in the manufacture and sale of equipment to the oil drilling industry. It owns more than 78% of the common stock of TWA, one of the country's leading airlines, and likewise a Delaware corporation. Toolco's controlling interest in TWA was acquired with the approval of the Civil Aeronautics Board (the

"Board") under § 408 of the Civil Aeronautics Act of 1938. The Toolco stock in TWA is presently held in a lender-controlled voting trust ("Voting Trust") created in 1960 at the insistence of Equitable, Metropolitan, and a group of banks headed by Irving, as a condition to their supplying senior financing to TWA in connection with its acquisition of jet aircraft.

Metropolitan and Equitable are the first and the third largest insurance companies in the United States, respectively. Equitable and Metropolitan have been suppliers of senior long-term financing to air carriers (including TWA, as to Equitable) for many years. Irving is a commercial bank in New York City. It has been one of TWA's principal commercial bankers for many years and has made loans and participated with other lenders in making loans to TWA. Oates and Sessel are, and Hagerty was, at pertinent times, officers of Equitable, Irving and Metropolitan, respectively, and Sessel is also a director of TWA. The investment banking firm of Dillon, Read has for some years been a financial adviser to TWA. Tillinghast and Breech are, respectively, the president and chairman of the Board of Directors of TWA, installed under the Voting Trust; and Breech was, from December 1960 until January 26, 1962, one of the voting trustees appointed by the lending institutions. (B-62, 67, 68, 88, 93, 94-95, 113, 121-22, 150, 196-97)

The Pleadings

The complaint by TWA, filed on June 30, 1961, names as defendants Toolco, Raymond M. Holliday, an officer and director of Toolco, and Howard R. Hughes ("Hughes"),[4] the sole stockholder of Toolco. It al-

[4] Although named as a defendant, Hughes was never served with the summons and complaint in the action. He has not been an officer or director of Toolco since December, 1960.

leges that the defendants violated the antitrust laws in connection with Toolco's acquisition of control over TWA and its exercise of that control in regard to acquisition of aircraft and financing for TWA.[5] The complaint seeks treble damages for the alleged antitrust violations in the amount of $105 million, divestiture of Toolco's stock interest in TWA, and other equitable relief. (AA-1-30)

The answer and counterclaims were filed by Toolco on February 13, 1962. The answer denies the alleged violations of law. It also pleads that the District Court has no jurisdiction over the subject matter and that the complaint fails to state a claim on which relief can be granted for the reasons that:

> (i) the Board has authorized and approved the acquisition and exercise of control by Toolco over TWA;
>
> (ii) the Board has retained and exercised regulatory jurisdiction over all transactions between Toolco and TWA; and
>
> (iii) the Board has specifically approved every transaction between Toolco and TWA involving the acquisition of flight equipment or financing. (AA-31-40)

The counterclaims[6] describe a course of conduct by the additional defendants in seizing control over TWA and using and perpetuating that control for their own interests. This course of conduct was

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[5] The complaint also contains a pendent-jurisdiction common-law claim of malicious injury to TWA's business.

[6] As used herein the term "the counterclaims" refers to the first five counterclaims filed by Toolco. Review of a separate judgment relating to the Sixth Counterclaim, for a few days' interest, is not being sought in this Court.

manifested in the insistence of the additional defendants on the creation of the Voting Trust, was expressed in transactions between the additional defendants and TWA thereafter, and culminated with the filing of the antitrust complaint by the lender-controlled management of TWA in order to compel Toolco to divest itself permanently of its entire interest in TWA. It is alleged, *inter alia,* that:

(a) Equitable and Metropolitan, together with Prudential Life Insurance Company of America ("Prudential"), have dominated the supplying of senior long-term financing to the major airlines of the United States (para. 62; AA-50-51);[7]

(b) Prior to 1956, lending institutions including Metropolitan, Equitable, and Prudential entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of

[7] Equitable and Metropolitan have admitted that as of December 31, 1960, their total investment in air carriers exceeded $476 million. (B-67, 93) The extent to which Metropolitan, Equitable and Prudential have dominated the market in the supplying of senior long-term financing to the so-called "Big Four" of the domestic airline industry is further shown by the following figures as to amounts authorized under loan or note purchase agreements entered into since 1954, and in force as of December 31, 1961, extracted from a Staff report, "Proposed Merger of Eastern Air Lines and American Airlines," to members of Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 87th Cong., 2d Sess., March 23, 1962, p. 25.

(In millions of dollars)

	Equitable	Metropolitan	Prudential	Other Insurance Cos.	Banks
American	55.0	160.0	75.0	....	....
Eastern	90.0	....	72.75	....	70.0
TWA	99.9	99.9	....	....	112.2
United	....	99.9	40.0	11.0	165.0

the traditional senior lender to that airline, and (ii) that if the traditional senior lender refused to supply such financing except upon particular terms none of such lending institutions would supply financing on any other terms (para. 80; AA-56-57);

(c) Thereafter Equitable, Metropolitan, Irving and others entered into an agreement and conspiracy to acquire control of TWA to use it as a captive market for financing on terms advantageous to the lenders. By anticompetitive practices, economic pressure and the dominance which they had over senior long-term financing to airlines, the lenders forced Toolco to yield control of its voting rights on its TWA stock to them through the Voting Trust. (paras. 86-94; AA-59-71)[8]

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[8] Although the additional defendants have denied any improper concerted action in insisting upon a lender-controlled Voting Trust as the price of their supplying financing to TWA, the reply of Irving and Sessel admits that at a meeting on October 6, 1960, at which a representative of Equitable was present, Irving and the group of banks which it headed were advised by Sessel that he had heard that Hughes felt a Voting Trust preferable to receivership. Sessel on behalf of the banks informed Toolco's representatives that the banking group would not participate in any financing plan for TWA which did not require Toolco to place its TWA stock in a Voting Trust; that Toolco would have to agree by 5:00 p.m. that day to accept a Voting Trust; that the consequence of failure to adopt a plan might be receivership both for TWA and Toolco; and that unless a plan were adopted Irving would have to collect a substantial personal debt owed by Hughes and to proceed to realize immediately on Hughes' stock in Toolco, which had been pledged as security for the Irving loan. (paras. 47(i), 47(j); B-133-134) A memorandum by an officer of the Mellon National Bank & Trust Co. describes these events as follows:

> "Raymond Cook, Hughes' attorney, had already been told by Ben Sessel that any plan proposed by the Tool Company that did not include a voting trust arrangement would not be viewed sympathetically by the banks. For the record,

(d) As a result of the pressure exerted by the lending institutions, Toolco agreed to place its TWA stock in a Voting Trust but only after Irving and the other banks had agreed that TWA would be given the right to refund without premium or penalty the senior indebtedness to be provided by the lenders to TWA and that Toolco would be entitled to purchase the senior indebtedness at the principal amount plus accrued interest. Thereupon Metropolitan demanded that the right of Toolco to purchase the bank and insurance company indebtedness, in order to terminate the Voting Trust, be conditioned upon the payment of a premium to be initially 22% of the principal amount of the insurance company debt, plus accrued interest (*i.e.*, $20,416,000). Toolco attempted to obtain financing elsewhere, but was unable to do so. (paras. 94(k)-(r); AA-67-71)

(e) After all efforts to obtain financing elsewhere had failed, Toolco in December, 1960, placed its TWA stock in the Voting Trust upon which the lenders had insisted. Toolco was granted the right and option to terminate the Voting Trust through

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Hughes related to Sessel a few days ago that if worse came to worse, 'a voting trust is preferable to receivership.' This was the first indication that Hughes could perhaps be pressured into a voting trust arrangement. With this likelihood in mind, it was decided to tell Hughes that; (i) no more loans will be made to TWA without an immediate voting trust agreement; (ii) the banks are ready to proceed with the Dillon-Reed (*sic*) plan if the insurance companies reaffirm their commitments; (iii) should Hughes not accept these provisions, the banks will set off deposit balances against loans at the opening of business on October 7; and (iv) this is a final decision and no more plans will be considered. Hughes was given until 5:00 Eastern Daylight Savings Time to make up his mind." (R. 1375-76)

the purchase of the senior indebtedness incurred by TWA but only upon the payment of the 22% premium to Equitable and Metropolitan which Metropolitan had demanded. (paras. 50, 95; AA-42-43, 71)

(f) The lending institutions thereby acquired full power to control the business and affairs of TWA. Under the terms of the Voting Trust agreement Equitable and Metropolitan, as holders of the majority of the senior indebtedness incurred by TWA in December, 1960, have the power to name two of the three voting trustees and to remove without cause and to name the successor to either or both of said trustees. The voting trustees in turn may under the by-laws of TWA reconstitute substantially at will the Board of Directors of TWA. They did so shortly after the imposition of the Voting Trust. Breech, who was chosen by the lenders as one of the voting trustees and as Chairman of the Board of TWA, and Tillinghast, selected as president of TWA, joined the alleged conspiracy. The additional defendants embarked on a course of conduct calculated to perpetuate their control over TWA, to frustrate Toolco's contractual right to terminate the Voting Trust, and to exercise control over TWA to obtain benefits for themselves at the expense of TWA and Toolco. (paras. 51-53, 95, 96; AA-43-45, 71-73)

(g) In furtherance of these ends the additional defendants have, *inter alia:*

(i) Caused TWA to enter into a contract with Tillinghast which provides that upon his retire-

ment or discharge at any time following termination of the Voting Trust (or upon his retirement at any time after five years) he shall receive a pension for ten years in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter.[9] (paras. 53(b), 96(b); AA-45-46, 73)

(ii) Caused TWA to enter into $147 million of additional financing with the lenders who controlled it and provided that the whole of such indebtedness could be accelerated by the lenders in the event of the termination of the Voting Trust.[10] (paras. 53(c), (e), 96(h); AA-46-48, 75-76)

(iii) Caused TWA to reject an offer by Toolco in June of 1961 to supply an additional $100 million of equity capital to TWA, conditioned only upon termination of the Voting Trust. (para. 96(f); AA-75)

(iv) Caused TWA to institute its antitrust action against Toolco in order to compel per-

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[9] Tillinghast and Breech agreed that it would be difficult for Toolco to refinance the 1960 loans to TWA, particularly in light of the 22% premium or penalty. (R. 884) Tillinghast also talked with Breech and representatives of the lenders at that time about additional financing of about $147 million. (R. 886-907)

[10] On deposition Tillinghast testified that he believed that the terms on which this additional financing was negotiated made it unlikely that Toolco would be able to terminate the Voting Trust because of the possibility of acceleration of this additional debt (A-322).

manent divestiture of Toolco's stock interest in TWA.[11] (para. 96(g); AA-75)

This course of conduct of the additional defendants in seizing and exercising control of TWA is alleged to constitute:

(i) A violation of the Federal Aviation Act (FAA) in that Metropolitan and Equitable are persons engaged in a phase of aeronautics within the meaning of § 408 of the Act who acquired and have maintained control of an air carrier without prior approval of the Board as required by said Section;

---

[11] In May and June of 1961, Toolco objected to certain acts of the lender-controlled management of TWA and particularly to the self-dealing implicit in the proposed financing of the acquisition of additional jet aircraft by loans from the very lending institutions which controlled TWA, under terms calculated to perpetuate their control over TWA. (Paras. 22-25, 53(d); AA-35-36, 46; see TWA complaint, paras. 36-48; AA-17-21) Toolco's counsel also indicated that it was investigating the circumstances which led to the creation of the voting trust and its operation. (See A-416, 417, 871-892, 899-906) Thereupon Tillinghast was advised by special counsel for TWA that it was unlikely that TWA would be free of controversy so long as Toolco owned the great majority of the stock of TWA and that "for that reason he [special counsel] thought a divestment proceeding was what was really needed in order to solve the problem." (A-345; A-359, 365, 558) The management of TWA then proceeded to seek to solve "the problem" in this manner. Drafts of an antitrust complaint were prepared and discussed with counsel for the voting trustees selected by the lending institutions (A-393, 452-62, 470). On June 29, 1961 the Executive Committee of TWA's Board, at a meeting at which Sessel was present by invitation, (A-414) authorized Tillinghast to file the antitrust complaint when he thought it advisable. (A-386, 401) Tillinghast authorized the filing of the complaint the next day. (A-399)

(ii) A violation of §§ 1 and 2 of the Sherman Act by reason of a combination and conspiracy to restrain and monopolize trade and commerce in the supplying of financing to air carriers and an acquisition of stock in violation of § 7 of the Clayton Act; and

(iii) A common law conspiracy wrongfully to deprive Toolco of control over TWA and an effort to perpetuate and maintain the control of the additional defendants in violation of Toolco's contractual rights and applicable Delaware law.[12]

By reason of these violations of law by the additional defendants, Toolco seeks injunctive relief, including termination of the Voting Trust, and treble damages of $231 million on its own behalf and $135 million on behalf of TWA. (AA-40-84)

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[12] The First Counterclaim alleges an interference with the contractual rights of Toolco by a course of conduct designed to interfere with the right of Toolco to terminate the Voting Trust and perpetuate the control of Metropolitan and Equitable over TWA; the Second repeats the allegations of the First, avers that Metropolitan and Equitable are engaged in a phase of aeronautics by reason of their dominance over the supplying of senior long-term financing to major airlines, and charges that their conduct together with that of Irving, in acquiring and maintaining control over TWA without the approval of the Board, violates § 408 of the Act; the Third, asserted derivatively on behalf of TWA, and the Fourth asserted by Toolco on its own behalf, reallege facts set out in the First and Second together with additional facts relating to the seizure and maintenance of control of TWA, and aver that the conduct of the defendants in acquiring, maintaining and perpetuating control of TWA is in violation of the antitrust laws; and the Fifth alleges that the same course of conduct violates Toolco's rights under the common law and the law of Delaware. All of them relate to the conduct of the additional defendants in seizing and maintaining control over TWA.

Replies to the counterclaims were not filed for almost a year. TWA moved on March 31, 1962 to dismiss the counterclaims. This motion was never decided by the District Court and was subsequently withdrawn by TWA except as to the Second Counterclaim alleging a violation of the Federal Aviation Act, which TWA asserted did not state a claim within the court's jurisdiction. (AA-143) On January 25, 1963, Equitable (B-61-86), Metropolitan (B-87-111), Irving and Sessel (B-112-148), Oates (f. 2623-47), and Hagerty (f. 2599-2622) filed their replies. Dillon, Read replied on February 5, 1963 (B-149-176), and TWA and Tillinghast on February 11, 1963 (B-194-195; B-196-204).

Toolco's Motion to Suspend Proceedings

At the time the counterclaims were filed the prevailing law in the Southern District of New York as to whether the federal courts could entertain an antitrust action based upon conduct which was also within the regulatory authority of the Board was the District Court's decision in the *Panagra* case, *United States* v. *Pan American World Airways, Inc.*, 193 F. Supp. 18 (S.D.N.Y. 1961). The District Court had held essentially that only if the Board had previously approved specified conduct were the federal courts superseded in their jurisdiction to entertain an antitrust action based upon that conduct, and had taken a narrow view of the supersession of the antitrust laws by the FAA. (*Id.*, at 45-47)

This Court, however, on January 14, 1963, reversed the judgment below in *Panagra* and held that the Board has superseding jurisdiction over matters alleged in an antitrust complaint which are subject to the

Board's broad regulatory powers. (*Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)).

As a result of this Court's decision in *Panagra* it appeared that a Board determination of matters within that agency's regulatory authority was a condition precedent to the prosecution of the counterclaims. (See AA-177-80; B-404-09) Moreover, the replies of certain of the additional defendants, filed on January 25, 1963, asserted as a defense that the Board had approved the Voting Trust arrangements. (Equitable, paras. 58-59, B-84; Metropolitan, paras. 58-59, B-109-10; Irving, para. 66, B-144). Accordingly, on February 6, 1963, Toolco (i) filed a complaint with the Board encompassing the course of conduct alleged in the counterclaims (AA-145-62) and (ii) moved in the District Court that, pending a determination by the Board of the Toolco complaint, the District Court stay proceedings on the counterclaims and award such other relief as appeared proper. (AA-263) This motion was set down for a February 18, 1963 hearing. (B-410-11)

Discovery Proceedings

On February 8, 1963, the District Court indicated its view that Toolco's conduct in discovery proceedings justified both an order of default judgment in favor of TWA on the complaint and the dismissal, with prejudice, of Toolco's counterclaims. (AA-191-197) At the same time, the District Court denied Toolco's motion—previously set down for February 18—for a stay of proceedings on the counterclaims. (AA-195) Orders granting default judgment against

Toolco on the complaint (AA-200-05) and dismissing Toolco's counterclaims with prejudice (AA-206) were entered May 3, 1963. The Court of Appeals expressed its agreement with the District Court's denial of Toolco's motion attempting to suspend proceedings pending a determination by the Board, and affirmed, as to four of the counterclaims, the judgment of dismissal with prejudice. It is accordingly necessary to an understanding of the decisions of the courts below that an account of the discovery proceedings—both as to the complaint, with which they were primarily concerned, and to the counterclaims—be set forth.

1. Priority and the commencement of discovery

The record reveals that the purpose of the lender-management of TWA in commencing this litigation was to compel Toolco to divest its stock in TWA, and that the litigation strategy of TWA has been to capitalize on the well-known reluctance of Hughes to appear in public in order to coerce settlement by Toolco.[18]

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[18] E. O. Cocke, a senior vice-president and director of TWA, testified about discussions among the directors and present management of TWA relating to the commencement of the action, as follows:

> "Q. . . . Do you have any recollection of what, if anything, was said about what efforts would be made to obtain the deposition of Mr. Hughes?
>
> "A. . . . There was discussion that I recall, that one of the reasons TWA was to file the suit first was to obtain the right of prior deposition.
>
> "I am not completely familiar with these legal terms, but I can only say that it was obvious if TWA had the right of prior deposition, that the deposition of Mr. Hughes would be taken before the deposition of any of the TWA witnesses.
>
> . . .
>
> "A. There had been discussions that if it was necessary

On June 30, 1961, simultaneously with the filing of its complaint under seal, TWA served on Toolco an order to show cause why the deposition of Hughes should not be immediately taken. (f. 61-65)

The District Court, per Judge Murphy, denied TWA's motion to take the deposition of Hughes (f. 55) and thereafter, per Judge Herlands, quashed TWA's notice of his deposition, and granted Toolco priority of discovery. (A-85) Thereupon, in August and September 1961, Toolco served subpoenas *duces tecum* upon various persons as witnesses, including persons later named as additional counterclaim defendants. These subpoenas covered the documents subsequently produced by respondents.

By reason of the pendency of various applications before Judge Metzner, to whom the action was assigned for all purposes, and at the suggestion of TWA, (f. 650-55) the commencement of depositions was held in abeyance until January 5, 1962. At that time Toolco commenced depositions in its position as defendant on the complaint, in accordance with its judicially recognized priority to take the deposition of TWA and of various witnesses it had noticed, including the persons later named as additional defendants on the counterclaims. (See B-27)

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for Mr. Hughes to make the deposition, that there would be a probability that it would be easier to reach a settlement, yes.

"Q. Do you recall anyone saying anything about Mr. Hughes' attitude about taking his deposition, or what he would do or not do depending on whether or not his deposition was ordered?

"A. There have been discussions as to the opinion, and I believe Mr. Slack made the statement, that if Mr. Hughes would not want to make a deposition, and that if he was forced to make a deposition, or that when that time came, the possibility of settlement would be greater." (A-560-61)

Shortly after the commencement of the depositions Hon. J. Lee Rankin, former Solicitor General of the United States, was appointed as Special Master to supervise the conduct of discovery. (A-139) In his order of February 7, 1962 appointing the Special Master Judge Metzner confirmed that discovery was to proceed on the basis of priority to Toolco. (A-139-143)

2. Efforts to interfere with Toolco's priority of discovery

On February 13, 1962, Toolco filed its answer and counterclaims. Additional defendants thereafter noticed Hughes' deposition. (B-255, 257, 278) TWA, notwithstanding that the deposition of Tillinghast, its president, had just begun, sought to terminate the deposition Toolco was taking in order to interpose the deposition of Hughes. (R. 18-21) On March 5, 1962, Judge Metzner ordered:

> "Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's [TWA's] claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants [on the counterclaims] may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions. At the conclusion of

> the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings." (AA-87)

The deposition of TWA by Toolco then proceeded, limited by the March 5 order, as enforced by the Special Master, to the issues of the TWA complaint and excluding inquiry with respect to the issues of the counterclaims.

Subsequent to the March 5, 1962 order, production of documents was undertaken by Toolco and the additional defendants. Documents had originally been sought by Toolco from the additional defendants by way of subpoenas *duces tecum* at a time when the counterclaims had not yet been served and when the additional defendants were noticed for deposition as non-party witnesses in connection with Toolco's discovery on the complaint. The return dates of the subpoenas were, from time to time, adjourned, although request was made for production of documents in advance of the time for oral deposition. (See, *e.g.*, f. 964-78) At the time the counterclaims were filed, some of the additional defendants had responded to their subpoenas. (See, *e.g.*, B-311-12) Thereafter the Special Master ruled that he would quash the subpoenas on condition that the additional defendants produce pursuant to Rule 34 the documents called for by the subpoenas. (f. 6730)

The additional defendants and TWA obtained over 325,000 pages of documentary material from Toolco

which Toolco was required to produce in New York, Houston and Los Angeles.[14] (See B-315)

In June, 1962, in continued pursuit of its tactic to terminate Tooleo's discovery, TWA once again moved to suspend the deposition of Tillinghast then in progress so as to commence the examination of Hughes. (f. 26694) By order dated July 12, 1962, Judge Metzner affirmed the Special Master's denial of this motion. (A-88)

In September 1962 TWA again sought to interrupt Toolco's depositions. On September 15, 1962, the Special Master denied TWA's motion, stating:

> "I had thought that before we completed the testimony of Mr. Tillinghast, I would be informed about the ultimate facts that the plaintiff was relying upon to support the various allegations of its complaint . . . .
>
> "I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.
>
> "But I did find that I was in that position. . . ." (A162-63)

The Special Master therefore recommended that the parties apply to Judge Metzner for Rule 16 and other procedures looking toward an order limiting the legal

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[14] Toolco claimed the attorney-client privilege as to certain documents. The Special Master held that the attorney-client privilege had been waived by Toolco's answer and by various affidavits filed on its behalf with the Board. (See AA-95; B-453) The District Court affirmed this determination. Toolco unsuccessfully attempted to obtain an interlocutory review of this ruling from the Court of Appeals. (See B-373-74; f. 3851)

and factual issues raised by the complaint, answer and counterclaims. (See A-163-165; see also A-751-53.) He stated that he himself would request the court to take such action if no party did so. (A-165) Toolco filed such an application on September 25, 1962. (R. 133-44) TWA opposed this procedure. (f. 27045)

Pending a decision by Judge Metzner on its Rule 16 application, Toolco continued its efforts to obtain from TWA a specification of the ultimate facts on which TWA relied in support of its complaint. As a supplement to the deposition it was conducting, Toolco served written interrogatories on TWA. (f. 27491) TWA objected to them. On October 25, 1962, the Special Master directed TWA to answer the interrogatories stating that he considered such answers to be of prime importance in the conduct of the litigation. (See R. 1229-31) TWA appealed to the District Court from this determination, and also appealed a subsequent decision of the Special Master (R. 1234-35) requiring it to answer a second set of interrogatories addressed to issues of the complaint not dealt with by the first set. (f. 2214, 2331)

On October 25, 1962, the Special Master set February 11, 1963, as the date for the commencement of the Hughes deposition. (A-171) He expressly found that Toolco had been proceeding diligently with its discovery proceedings. (A-166) The Special Master indicated that before February 11 he expected (1) that the Rule 16 application recommended by him would be ruled on, (2) that the District Judge would have also ruled on TWA's objections to the interrogatories served by Toolco, and (3) that Toolco would have thereby a further particularization of the complaint, and would

be in a position to bring on for hearing its motion to dismiss the complaint.[15] (A-171-172) Pursuant to the Special Master's direction, Toolco did conduct further depositions while awaiting the District Judge's disposition of TWA's appeals from the rulings of the Special Master.

It was not until January 10, 1963 that the District Court ruled on the matters before it. Judge Metzner then (a) presently denied Toolco's application of September 25, 1962 for Rule 16 proceedings, (b) ordered that the interrogatories served on TWA need not be answered until 60 days after completion by TWA of its deposition of Hughes, (c) ordered production of documents as to which Toolco had asserted the attorney-client privilege, and (d) confirmed the February 11, 1963 date for the Hughes deposition. (AA-90-94)

Thereafter, Toolco brought on its motion to dismiss the complaint. (B-338-48) On February 6, 1963, Judge Metzner denied that motion from the bench. (A-98) At that time Toolco requested that he certify to the Court of Appeals, pursuant to the provisions of 28 U.S.C. § 1292(b), the questions whether the District Court's jurisdiction was superseded by that of the Board, under the ruling of this Court in *Panagra* on January 14, 1963, and whether Toolco had a valid defense to the acts complained of by virtue of the various orders of the Board in reference to the Toolco-TWA relationship. Without giving any reason therefor, the District Court denied the request for certification of an interlocutory appeal. (A-98)

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[15] Toolco also had filed a motion for summary judgment under Rule 56, Fed. R. Civ. P. (f. 276)

3. The Toolco notice of position

On February 8, 1963, Toolco was in the position where by reason of orders which it believed erroneous: (1) its motion to dismiss the complaint had been denied; (2) its request for certification of interlocutory review of the denial of the motion to dismiss had been denied; (3) its request for protective relief under Rule 30(b) so as to avoid the burden and great expense of oral deposition in California had also been denied; and (4) it was required to produce confidential financial statements for the years 1961 and 1962 which it believed were irrelevant,[16] as well as documents which it believed were subject to the attorney-client privilege.

Toolco's alternatives at that point were to proceed with the burdensome and expensive litigation or to rest on the merits of the positions it had taken in connection with proceedings on the complaint and thereby attempt to obtain appellate review. Toolco determined that the cost of further discovery would exceed any damages which TWA might be able to establish, particularly since Toolco, as 78% stockholder of TWA, was bearing not only the cost of

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[16] In its original production of documents in March 1962, Toolco had produced all of its tax returns for the period 1939-1960. In January, 1963, the additional defendants and TWA moved for the production of confidential financial statements and tax returns for the years 1961 and 1962, as well as work papers for financial statements previously produced, on the grounds that Toolco had been motivated by tax considerations in connection with transactions with TWA. Toolco disputed the relevance of these documents on the grounds that any tax motivations had no bearing on the charges of the complaint and did not afford the additional defendants a defense on the counterclaims. (AA-136-138) The District Court nevertheless ordered the production of the documents. (AA-143-144)

its own defense but the major portion of the cost of prosecuting itself as well. Toolco therefore made a "business decision" to proceed no further as to the complaint. Having already moved the District Court for a suspension of further litigation on the counterclaims, Toolco filed a Notice of Position advising that it would rest on the merits of its positions and proceed no further with discovery on the complaint. (A-130-31)

4. The imposition of sanctions against Toolco on the complaint

As a consequence of Toolco's Notice of Position and the advice that Hughes would not appear for deposition, the District Court entered an order on May 3, 1963, directing the entry of a default judgment against Toolco on the complaint. It ordered a hearing by the Special Master to determine damages and reserved the question of divestiture of Toolco's stock in TWA for itself. Notwithstanding that the District Court had refused at the time it denied Toolco's motion to dismiss on February 6, 1963 to certify for interlocutory appeal the issues raised by the motion, the Court now made such a certification in its opinion and order granting the TWA motion for default judgment. (32 F.R.D. 604; A-132)[17]

[17] The controlling question of law which the District Court certified for appeal in its order granting a default judgment to TWA was the same question of law which the District Court had refused to certify following the denial of the motion to dismiss the complaint. If the certification had been granted at the time the motion to dismiss was denied on February 6, 1963, Toolco would not have been faced with the decision whether to proceed further with discovery, would not have been required to file its Notice of Position, would not have been found in default, and would have had review of the identical questions that were finally certified.

5. The imposition of sanctions against Toolco on the counterclaims

This case, of course, relates solely to the dismissal with prejudice of Toolco's *counterclaims*.—During the course of the hearing on February 8, 1963, with respect to Toolco's Notice of Position, the District Court inquired whether Hughes would be available for deposition by the additional counterclaim defendants.[18] Toolco reminded the District Court that its motion for a stay of the counterclaims theretofore filed had been scheduled for hearing on February 18. Toolco reiterated the position that it had taken on February 6, 1963 that it could not prosecute its counterclaims without a determination by the Board of the matters submitted to it. (AA-174-76, 192-93) The District Judge then said:

> "We might as well then consider the motion at this time for a stay on the proceedings on the counterclaims and deny that stay, and from then on we come to the question of what is the state of the record, come Monday, if Mr. Hughes does not appear; and, as I understand it, even if he does appear, it will make no difference. (AA-195)

The District Judge concluded by saying:

> "Judge Bromley [attorney for four of the additional defendants], you may proceed on February 11, if you wish to wait until that time—and it is too late for you to make the application tonight—for a judgment of dismissal of the counterclaims with prejudice." (AA-196)

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[18] The additional defendants by the order of March 5, 1962 had been given the right to participate in depositions to be conducted by TWA.

Thereafter, pursuant to the suggestion of the Court, the additional defendants moved for a dismissal with prejudice. The motions to dismiss the counterclaims with prejudice were granted on May 3, 1963.

In its brief order of dismissal, the District Court stated simply that the judgment on the counterclaims would be entered for the reasons given in the opinion directing the entry of the default judgment on the complaint and dismissal of the counterclaims as to TWA. (AA-206)

6. The affirmance by the Court of Appeals

The Court of Appeals granted interlocutory review of the determination of the District Court denying the motion to dismiss the complaint. It did not consider the propriety of granting default judgment on the complaint.

With respect to the judgment dismissing the counterclaims with prejudice, the Court of Appeals held that (a) the Board did not have superseding jurisdiction over the counterclaims, except for the Second Counterclaim, (b) the Court of Appeals was not required to consider whether a voluntary dismissal without prejudice rather than a dismissal with prejudice would have been appropriate because—it said—Toolco failed to request such a voluntary dismissal, (c) the discovery orders on which the default orders were based were validly issued, and (d) Hughes' failure to make deposition justified the entry of a dismissal with prejudice of Toolco's counterclaims. Accordingly, it affirmed the judgment, except as to the Second Counterclaim, which it ordered dismissed for lack of jurisdiction. (332 F. 2d 602; R. 1413, 1428-37)

SUMMARY OF ARGUMENT

I. In the light of Toolco's position that this Court's decision in *Panagra* precluded the present prosecution of its counterclaims, it was error for the District Court to have dismissed those counterclaims with prejudice. Shortly after this Court's decision in *Panagra* (*Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)), Toolco filed a complaint with the Board encompassing the dominant facts of its counterclaims and notified the District Court that it was suspending the judicial prosecution of those counterclaims. It was error—on two alternative bases—for the District Court to have declined to accept this position on Toolco's part.

A. The dominant facts alleged in each of the counterclaims related to the wrongful acquisition and maintenance of control over TWA by Metropolitan, Equitable and Irving. Because of their extensive long-term financing positions in the airline industry, there was substantial ground for Toolco's position that these institutions are "engaged in a phase of aeronautics." If they were so engaged, their acquisition and exercise of control over TWA was unlawful without an approval order of the Board under FAA § 408. It was, moreover, the Board's province, under the Congressional scheme of regulation, to determine whether these lenders were in fact engaged in a phase of aeronautics. As we demonstrate in our Brief in No. 443, the District Court accordingly, under *Panagra*, had no jurisdiction over the allegations of Toolco's counterclaims prior to a Board determination, inasmuch as those counterclaims in essence attacked the acquisition and exercise of control over a regulated air carrier by parties engaged in a phase of aeronautics. Once such a relation-

ship had been found to exist by the Board, it would have been up to the Board to determine whether, and to what extent, the commencement of control, and its exercise, should be tolerated under the policies laid down in the Act, the administration of which are vested in the Board.

Accordingly, a full submission of the matters raised by Toolco's complaint to the Board, and a resolution of those issues by the Board, was a condition precedent to the maintenance of Toolco's counterclaims in court. The Court of Appeals partially recognized this by its holding that Toolco's Second Counterclaim—based in terms on the Federal Aviation Act—was outside the jurisdiction of the Federal courts. But the court below fell into error—due to its narrow view of the extent to which the Board's regulatory regime over control relationships has superseded the antitrust laws, as we discuss in our Brief in No. 443—in not applying a similar treatment as to the remaining counterclaims.

It is both impractical, and violative of the rule that a claimant must seek in a single action all of the relief to which he is entitled by reason of a single course of conduct, to attempt to chop out of the unitary course of conduct alleged in the counterclaims fragments as not being within the regulatory regime of the Board, and over which the District Court might have exercised jurisdiction prior to a Board determination. Toolco recognized that its counterclaims were at least in dominant part within the areas reserved to the Board. In the light of this, the District Court should have dismissed all the counterclaims for want of jurisdiction, without prejudice to their reinstitution, if appropriate, after action by the Board, when Toolco's judicial cause of action would have matured.

B. Even if Toolco was not correct in its position that the *Panagra* decision taught that the matters raised by the counterclaims did not lie within the jurisdiction of the District Court, it was, nonetheless, a denial of due process, or an abuse of discretion, to have entered a dismissal with prejudice. Toolco's failure to proceed—and its consequent failure to make discovery—arose out of its affirmative decision to suspend prosecution of its counterclaims, based on its view of the *Panagra* case. This was a substantial position on what was at least a close and vexing question. There was no basis for a judicial presumption that Toolco was admitting lack of merit on its counterclaims by declining to proceed further on them. In view of the meritoriousness of Toolco's claims, the procedural posture of the case under Rule 41(a) of the Federal Rules of Civil Procedure, and the justification for Toolco's decision to stop litigating, it amounted to an abuse of discretion, if not a denial of due process, to have dismissed the counterclaims with prejudice. A "non-suit"—a dismissal without prejudice—should have been entered under Rule 41(a). In any event, it was error for the District Court not to have made findings as to why no form of disposition of the matter less severe than dismissal with prejudice would have sufficed.

II. One of the counterclaims dismissed with prejudice was a derivative counterclaim, brought in the right of TWA against the remaining respondents. Under Rule 23(c), it was erroneous to have entered a dismissal with prejudice on this counterclaim without giving notice to the minority stockholders of TWA. No such notice was given; accordingly, in any event, as to this counterclaim, the dismissal with prejudice cannot stand.

ARGUMENT

I. IN THE LIGHT OF TOOLCO'S POSITION THAT THIS COURT'S DECISION IN PANAGRA PRECLUDED THE PRESENT PROSECUTION OF ITS COUNTERCLAIMS, IT WAS ERROR FOR THE DISTRICT COURT TO HAVE DISMISSED THOSE COUNTERCLAIMS WITH PREJUDICE.

Toolco took the position in the District Court that in the light of this Court's decision in *Panagra, Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), and in the light of the fact that it had filed a complaint with the Civil Aeronautics Board ("the Board") embracing the dominant subject matter of its counterclaims, it was not proper for it further to prosecute its counterclaims in the District Court at that juncture.[1] The District Court did not accept this view. When Toolco stood on its view and declined to proceed with [redacted] to make discovery upon its counterclaims, the District Court dismissed those counterclaims with prejudice.

We contend that this action of the District Court was erroneous on two bases.

A. We contend (pp. 31-51, *infra*), that the courts below should have found that it was necessary that the matters raised by Toolco's counterclaims be considered by the Board before being made the subject of an action in court, and that in fact Toolco's position in not going forward with the counterclaims was accordingly correct. *Cf. United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 680-81 (1958).

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[1] The *Panagra* decision was announced on January 14, 1963. The complaint was filed with the Board on February 6, 1963, and on that date Toolco moved the District Court for a suspension of proceedings on the counterclaims.

B. Moreover, even if the narrow view of the Board's functions taken by the court below were correct, Toolco's position that the matters should have gone to the Board was a justifiable position taken on a complex, substantial question; and, as we demonstrate below, under all the circumstances, including the lack of countervailing considerations, it was an abuse of discretion, if not a denial of due process, to have dismissed the counterclaims with prejudice because Toolco took this position. (See pp. 52-67, *infra*).

A. The Proceedings in the District Court on the Counterclaims Were Superseded by the Powers of the Civil Aeronautics Board Under the Federal Aviation Act, and Toolco's Position That the Counterclaims Should Not Have Been Further Litigated in the District Court Was Correct

The "dominant facts"[2] alleged in each of the counterclaims were the wrongful acquisition and maintenance of control over TWA by Metropolitan, Equitable and Irving—the "lending institutions." In the Second Counterclaim this course of conduct is alleged to be in violation of the Federal Aviation Act; in the Third and Fourth Counterclaims it is alleged to be in violation of the antitrust laws. The Third and Fourth Counterclaims allege that the lending institutions seized control over TWA in order to use it as a captive market for senior financing, and that the individual additional defendants on the counterclaims participated in accomplishing this purpose, all in violation of the antitrust laws. The Third and Fourth Counterclaims seek injunctive relief (as does the Second), termination of

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[2] *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474, 483 (1932).

the Voting Trust, and treble damages for injuries committed separately to Toolco and to TWA.[3]

Shortly after this Court's decision in *Panagra*,[4] Toolco filed a complaint with the Board embracing the dominant matters in its counterclaims and moved to suspend proceedings on its counterclaims in the District Court. The District Court declined to suspend proceedings, and when Toolco declined further to proceed, the District Court entered an order dismissing all of Toolco's counterclaims with prejudice.—The Court of Appeals, however, recognized that Toolco's Second Counterclaim, alleging that the acquisition and maintenance of control by the additional defendants Metropolitan, Equitable, and Irving

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[3] The First Counterclaim is not in terms based on the antitrust laws or the Federal Aviation Act, but upon common law principles. It seeks injunctive relief against a course of conduct by the lending institutions and the individual additional defendants designed to perpetuate the Voting Trust. That its factual basis is completely intertwined with the bases of the counterclaims premised on the Federal Aviation Act and the antitrust laws is evident from the fact that the pleading of facts in these counterclaims substantially realleges the allegations of the First Counterclaim. (AA-49; 52) Moreover, the First Counterclaim was closely intertwined with the matters charged in the complaint, which, we have shown in our Brief in No. 443 (pp. 41-62), relate to matters within the regulatory control of the Board; the only basis of subject matter jurisdiction in the District Court over the First Counterclaim was the compulsory counterclaim rule (F.R. Civ. P. 13(a)), which of course is only applicable to claims arising out of the same "transaction or occurrence" as those urged in the complaint.

In addition, there is a Fifth Counterclaim based on Delaware law respecting Voting Trusts which is admittedly pleaded as "ancillary" to the antitrust claims. (AA-78)

[4] *Panagra* was decided on January 14, 1963, and Toolco filed its complaint with the Board on February 6, 1963. Moreover, in January, 1963, replies by the additional defendants were filed asserting Board approval of the Voting Trust. See p. 14, *supra*; p. 42, *infra*.

was in violation of FAA § 408 and that the Voting Trust was accordingly unlawful, raised a matter within the superseding jurisdiction of the Board. It accordingly modified the order of dismissal with prejudice on that counterclaim, ordering it dismissed for lack of jurisdiction.[5] However, it affirmed the dismissal with prejudice of the other counterclaims.

The Court of Appeals' error—a reflection of the overly narrow view of the Board's powers, which it took in No. 443—was in failing to recognize that the facts alleged in the Second Counterclaim are alleged in each of the remaining counterclaims, and that, despite the theory upon which relief may be sought, the matters raised by the counterclaims as to such a course of conduct lay within the superseding jurisdiction of the Board, if the lending institutions were "engaged in a phase of aeronautics."—As we demonstrate in our Brief in No. 443, the Court of Appeals took entirely too confined a view of the extent to which the jurisdiction of the Board supersedes that of the courts where antitrust issues relating to the commencement or maintenance of control of an air carrier by persons engaged in a phase of aeronautics are concerned. Moreover, the power to rule on whether the lending institutions were and are in fact "engaged in a phase of aeronautics" is one reserved to the Board. We accordingly submit that, as to the counterclaims, the Court of Appeals fell into an error comparable to the one it fell into in No.

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[5] "As for the second counterclaim—which alleges a violation by the additional defendants of § 408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly." 332 F. 2d, at 613 (R. 1432)

443, and thus failed to perceive that its holding as to the Second Counterclaim was equally applicable to the remaining counterclaims. Dismissal without prejudice for want of jurisdiction was the necessary disposition of all the counterclaims.

As we demonstrate in our Brief in No. 443 (pp. 44-47, 59-62), it is because Congress intended that the Board would be the authority vested with powers to examine the relationship between an air carrier and a party controlling it which is engaged in a phase of aeronautics, and intended that the Board would apply to that relationship standards which it has the duty under the Federal Aviation Act of articulating, that Toolco's counterclaims could not have been prosecuted at this juncture in the District Court. Since the subject matter of the counterclaims was entrusted to the Board, the District Court did not have jurisdiction to enter a dismissal with prejudice, which precludes further action on the merits, with respect to them. *Cf.* Fed. R. Civ. P. 12(h)(2).[6]

As we develop in our Brief in No. 443 (pp. 46-47, 69), FAA § 408 requires that the Board determine whether the acquisition and maintenance of control over an air carrier by a person engaged in a phase of aeronautics is consistent with the public interest under the standards of preventing monopoly (§ 408(b)) and fostering the aviation industry (§ 102) of the Act. If the relationship between the party engaged in a phase of aeronautics and the air carrier is found to be consistent with the public interest by the Board, the order approving the relationship under § 408 carries with it, under

[6] The Court of Appeals recognized this as to the Second Counterclaim.

§ 414, immunity from the antitrust laws, and, in fact, from all other "restraints or prohibitions made by, or imposed under, authority of law" insofar as may be necessary to enable the controlling person "to do anything authorized, approved or required by such order" approving the relationship.

In fulfillment of its duties to foster sound economic conditions in air transportation, the Board must have jurisdiction to determine what sorts of activity by a non-carrier affect the economic conditions of air transportation so that that non-carrier may properly be defined as being "engaged in a phase of aeronautics," and so that a control relationship between that person and an air carrier would be subject to the provisions of § 408. Determining whether a party—like the lending institutions here—is "engaged in a phase of aeronautics" is not a sterile exercise in parsing the language of the statute. Rather, it is dependent upon a broad economic, administrative, and legal judgment, based upon an intimate knowledge of the civil aviation industry in all its aspects. The determination must be made by a body mindful of the overall regulatory pattern of the Act. The competence, then, to make such a determination is uniquely the Board's; and the Board is the body which has been selected by Congress to make it. As this Court observed in *Far East Conference* v. *United States,* 342 U.S. 570, 574-75 (1952):

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

Clearly then, once a substantial claim exists that a person or persons who propose to come into control, or who have come into control, of an air carrier are engaged in a "phase of aeronautics" within the meaning of the Act, the determination whether those parties are so engaged must be one to be made by the Board. Otherwise, the collision of two regimes, against which this Court warned in *Panagra,* would readily follow. A court might hold that the relationship was not subject to § 408 in a case where the administrative processes of the Board had never been invoked as to the question. Confusion as to status and embarrassment to the Board's powers under § 408 would result.

Moreover, as we have demonstrated exhaustively in our Brief in No. 443 (pp. 46-53), once such a type of control relationship is found to exist by the Board, it is the Board that must have power to determine whether, and on what basis, it should be tolerated. The Board's is the power to determine the extent of the regulation required in a particular case—whether that relationship should be absolutely prohibited; whether it should be permitted without antecedent condition, subject only to the Board's continuing statutory powers; or whether, in addition, the relationship should be permitted only upon express, specific conditions, and what those conditions should be. Only when that task has been completed by the Board, and there remains some conduct which the Board has declined to sanction and which has done an actionable wrong to private parties, can a private right of action, under the antitrust laws or otherwise, arise out of the regulated relationship.[7]

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[7] This is particularly true as to wrongs allegedly done to the parties to the regulated relationship, or to their stockholders as such, like Toolco.

Although the supersession of the antitrust laws with respect to a complaint involving a control relationship between a person engaged in a phase of aeronautics and an air carrier depends, as we develop in our Brief in No. 443 (pp. 47, 61-62), in a material part on the exemptive power of the Board, it is the existence of that power (see *Far East Conference* v. *United States*, 342 U.S. 570, 577, 578 (1952)), and not whether exemption would be granted or has been granted in any particular case, that is the factor. So long as a real possibility exists that the "two regimes might collide," the processes of the Board must be exhausted. It is for the Board to say, in this case, whether it would sanction control of one of the country's "Big Four" air carriers by two of the three dominant suppliers of senior long-term equipment financing—one of the most important "commodities" consumed by the capital-hungry airlines. The making of that determination by the Board was a condition precedent to the prosecution by Toolco of its counterclaims.

Accordingly, promptly after the additional defendants replied to the counterclaims asserting Board approval of the Voting Trust under the FAA, and this Court rendered its decision in *Panagra*, Toolco filed a complaint with the Board, asking the Board to find that (1) Metropolitan, Equitable and Irving are engaged in a phase of aeronautics; (2) that they have acquired and are maintaining control over TWA without prior Board approval, in violation of FAA § 408; and (3) that the control so acquired and maintained is not consistent with the standards of the public interest under the Act.—In taking these questions in hand, the Board must pass upon precisely the same matters as those which are the dominant subject matter of Toolco's counterclaims.

1. *As to Involvement in a Phase of Aeronautics.*— Whether Metropolitan, Equitable and Irving are engaged in a phase of aeronautics requires a detailed review of the activities of each of these lending institutions with respect to the airline industry in order that the Board may determine the extent to which those activities have given rise to the sort of situation which FAA § 408—and its related provision, § 409—intended to subject to regulation by the Board. As the Board has repeatedly recognized, Congress intended that the Board should have jurisdiction over all situations where one engaged in a given activity would, by acquiring control of an air carrier or entering into an interlocking relationship with an air carrier, be placed in a position that either an actual or potential conflict of interest would result. See, *e.g., Lehman Brothers Interlocking Relationship Case,* 15 C.A.B. 656, 673-74 (1952), *aff'd sub nom. Lehman* v. *CAB,* 209 F. 2d 289 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 916 (1954); *Transcontinental & Western Air, Inc., Control by Hughes Tool Company,* 6 C.A.B. 153, 156 (1944); *Cohu-Transcontinental & Western Air, Inc., Interlocking Relationship,* 1 C.A.B. 547 (1939); *Ames-Continental Airlines Interlocking Relationship,* 1 C.A.B. 498 (1939). The Board has in the past noted possible violations of the Act by lending institutions and the extent to which the airline industry is dependent upon a few lending institutions for financing.[8]

[8] See Hector, *Problems of the CAB and the Independent Regulatory Commissions,* 69 Yale L.J. 931, 956 (1960), where the author, a former CAB member, states:

> "A clear example of this conflict [between enforcement of the Act and promoting the well-being of the industry] has occurred recently in the CAB. In July 1957, the staff informed the Board that certain loans to air carriers involved the possibility of illegal control situations or conflicts of interest. The staff was instructed to watch the matter. During the following year, the number, size, and complexity of the

—The Court of Appeals, in directing the dismissal of the Second Counterclaim, recognized that only the Board may determine whether any of the additional defendants is engaged in a phase of aeronautics. (332 F. 2d, at 613; R. 1432) The respondents have not contended the contrary.

In determining whether the activities of Metropolitan, Equitable and Irving, or any of them, are such that the control relationship between them and TWA is one subject to regulation by the Board under §§ 408 and 409, the Board must examine the airline industry's need for capital to finance its enormous requirements for equipment. The Board must consider whether the furnishing of that financing is done on a specialized basis, and whether the airlines are dependent on it, as they are on the furnishing of landing gear, aircraft engines, or other physical parts. The Board might then conclude that, just as those who furnish landing gear and aircraft engines are "engaged in a phase of aeronautics," those who specialize in furnishing financing essential to the needs of the airlines are likewise so engaged. Relevant to this determination would be such further factors as: the availability of sources of financing to the industry, the terms and conditions upon which the financing has been made available, the

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loans increased. It was generally agreed that the problem was serious, that potential control and interlocking relationships were possibly being created, and that the Board's staff was having little success in digging out the facts by informal means. Some of the staff urged an investigation; others took a different view. They urged that since the carriers were then having a hard time financing new equipment, the investigation might have an adverse effect on their negotiations, and that this was incompatible with the Board's promotional responsibilities. A majority of the Board accepted this argument and voted not to institute any investigation."

extent to which the withholding of financing by those lending institutions from an airline because of their interest in another airline, or the supplying of financing on more favorable or less favorable terms, might affect the operation of the airlines, and the extent to which, by reason of their financial investment or the terms on which money has been advanced, the lending institutions have in effect been making management decisions.

To this determination such facts as the unquestioned dominance of Equitable and Metropolitan, together with Prudential, over the supplying of senior long-term financing to the major airlines and the conditions upon which those lenders grant or withhold financing are relevant. If, as alleged in the antitrust charges of the counterclaims, none of those institutions will lend money to an airline if the traditional senior lender refuses to do so, the impact upon the airline industry of a control relationship between one or more of those institutions and an air carrier becomes intensified. Similarly, the extent to which, from 1945 to the present, Equitable through the granting or withholding of its consent to a modification of indenture provisions has been able to influence or control the acquisition and financing of aircraft by TWA is suggestive of a pattern in which the activities of the lenders have enmeshed them in the operations of the airlines and thus in a phase of aeronautics.[9] That influence or control is an integral part of Toolco's counterclaims.

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[9] This is, of course, also relevant to the issue of the lenders' control of TWA—which in part may have antedated the establishment of the Voting Trust.

The extent of the control exercised by Equitable over the acquisition and financing of equipment by TWA and its dicta-

2. *As to the Lenders' Control over TWA.*—Similarly a determination as to whether the additional defendants have acquired control over TWA in violation of the Act requires a determination of matters at the heart of Toolco's counterclaims. Although it would appear that control would be sufficiently established by the undoubted fact that Equitable and Metropolitan through Irving as agent have the power to select and to remove without cause and replace two of the three voting trustees of more than 70% of the stock of TWA, the lending institutions have denied that they control TWA. (See Equitable's Answer before the Board, Dkt. 14314, p. 10; and see, *e.g.*, B-64)[10] Thus, the Board must inquire into all the facts and circumstances with respect to control.

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tion of the methods of financing by the granting or withholding of consent is shown by such examples as (i) the requirement of Equitable in 1947, as a condition to permitting Toolco to advance $10 million to TWA which TWA desperately needed, that Toolco, TWA and Equitable enter into an agreement by which Toolco's stock in TWA would be placed in a voting trust in the event of default by TWA on its indebtedness to Equitable; (A-243; R. 1277-1323) (ii) the requirement of Equitable on at least two occasions that Toolco agree to supply additional equity to TWA as a condition to TWA's financing aircraft acquisitions through bank loans; (R. 245-47; 270-74; 1324-25) (iii) the conditional sales agreements entered into between Toolco and TWA for the purchase of Constellation aircraft in 1949 and 1950, the form of such financing being dictated by the requirements of the Equitable indenture; (R. 1144-45; 1183-93; f. 22095-22100) and (iv) the establishment of a $10 million credit by Toolco in favor of TWA in 1956 on a basis subordinated to the outstanding bonds of Equitable. (R. 1369-72; f. 23852-53)

[10] Yet in the complaint (para. 31), the lender-management of TWA alleges that "the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies." (A-16).

Moreover, the lending institutions have claimed in their replies to the counterclaims (see, *e.g.*, B-84), and have asserted before the Board in their answers to Toolco's complaint (see, *e.g.*, DRt. 14314, Answer of Equitable, p. 13) that the Board, in approving certain transactions in December 1960 between Toolco and TWA, in effect approved the Voting Trust. Toolco disputes whether this action amounted to an approval of the Voting Trust; but, as we indicate in our Brief in No. 443 (pp. 79-80), this question is one for resolution by the Board. Such an approval would, of course, by reason of FAA § 414, carry with it an immunity from the antitrust laws.

3. *As to Whether Control of TWA by the Lending Institutions is in the Public Interest.*—Finally, in determining whether control by the lending institutions is or is not in the public interest under the standards of that Act, as the Board has repeatedly recognized, the widest inquiry is required. See, *e.g.*, *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950). To this inquiry the relationship of the lending institutions *inter se* and the extent of their domination of the equipment-financing market are clearly relevant. A control relationship which might be consistent with the public interest and not creative of monopoly if a competitive market in fact existed in the supplying of senior financing, and if sources for such financing were plentiful, may be quite otherwise where, as Toolco alleges, the major suppliers of airline financing have engaged in anticompetitive conduct and the supply of senior long-term financing to the major airlines has been dominated by the three largest insurance companies. Moreover, such matters as the self-dealing inherent in the lending institutions

negotiating with the management of TWA—which they control—for millions of dollars of new financing under terms calculated to perpetuate that control exemplify the extent of the antitrust problems and other public interest questions which have arisen and which may arise. Such matters are at the core of Toolco's counterclaims as well as its complaint to the Board. Indeed, the entire history of the dealings of these financial institutions with Toolco and TWA alleged in the counterclaims is of the greatest relevance to the determination of Toolco's complaint before the Board, for the past is a measure of the future. The conflicts which have arisen in the past and the anticompetitive conduct in which the lenders are alleged to have engaged since the seizure of control are guideposts in determining whether the control relationship should be sanctioned as consistent with the public interest and the avoidance of monopoly and restraints on competition.

Therefore, here, as in *Panagra*, the matters alleged in the counterclaims are the "precise ingredients of a case subject to the Board's broad regulatory and remedial powers . . ." (*United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963)) Moreover, here—unlike in *Panagra*—the Board has recognized that it has jurisdiction over the matters in issue. Toolco, using the private complaint procedure provided as part of the Act's scheme,[11] filed an appropriate complaint with the Board. The Bureau of Enforcement has found, as to Toolco's complaint to the Board, that:

> ". . . there are reasonable grounds to believe that certain provisions of the Act and requirements

[11] See our Brief in No. 443, p. 50 n. 8.

thereunder have been violated . . ." (Docket No. 14314, Petition for Enforcement, p. 3.)

* * * * *

Accordingly, it appears that a substantial claim was raised in Toolco's counterclaims that the lending institutions were engaged in a "phase of aeronautics" and that they had come into control of TWA. That there was a substantial claim was recognized by the Board's own Bureau of Enforcement. Therefore, since the antitrust claims and the claims under the Federal Aviation Act were the dominant elements of Toolco's counterclaims, and since the matters embraced in them—as well as claims based on any other legal theories, under the broad language of FAA § 414—might be barred by a Board order, a full submission of the matter to the Board was a condition precedent to the maintenance of Toolco's counterclaims in court. Moreover, Toolco sought injunctive relief on all its claims, and the granting of that relief as to any of them—if the Board had come to view the relationship between the lenders and TWA as in the public interest—might operate to terminate a relationship the continuance of which the Board had found to be in the public interest and necessary to foster sound economic conditions in the airline industry.

Finally, the Board's powers under § 411 of the Act, developed extensively in *Panagra,* must be borne in mind in considering whether the District Court had jurisdiction here. Under that provision the Board has power to take in hand a variety of problems relating to the conduct of regulated air carriers and, as we develop in our Brief in No. 443 (pp. 51-53), parties controlling them. That provision permits the Board to proceed administratively against "unfair practices"

and "unfair methods of competition." As this Court said in *Panagra*, these concepts are "not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly. These words, transferred to the . . . Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes." 371 U.S., at 307-08.

Accordingly, even if there were aspects of the relationship between the lenders and TWA forming the basis of Toolco's counterclaims which were outside the Board's powers under § 408 and its exemptive authority under § 414, the Board's powers under § 411, which are complementary to its other powers, must be taken into account. Their existence underscores that the counterclaims, as a whole, should not have been held to be a proper subject for judicial action until the Board had acted upon Toolco's complaint.

* * * *

The contradictions inherent in the decision of the Court of Appeals that the Second Counterclaim was within the exclusive jurisdiction of the Board but that the District Court had jurisdiction to determine the remaining counterclaims—though all demanded the same relief and posed an equal prospect of interference with the Board's processes—emphasize the impossibility of trying to chop out of the single course of conduct alleged in the counterclaims portions as not being within the regulatory regime of the Board and over which the District Court might have exercised jurisdiction prior to a Board determination.

Moreover, any attempt to separate from the single course of conduct alleged in the counterclaims frag-

ments over which the District Court could have presently exercised jurisdiction would be inconsistent with the proposition, essential to proper judicial administration, that a claimant must seek in a single action all the relief to which he is entitled by reason of a single course of action of which he complains. See, *e.g.*, *Macris* v. *Sociedad Maritima San Nicolas, S.A.*, 271 F. 2d 956 (2d Cir. 1959), *cert. denied*, 362 U.S. 935 (1960); *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F. 2d 362 (5th Cir. 1961); *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 468 (3d Cir. 1950),[12] *cert. denied*, 341 U.S. 921 (1951). *Cf.* Fed. R. Civ. P. 13(a). Thus, if Toolco presently obtained an adjudication respecting only some portions of the respondents' single course of action, or an adjudication solely on a common law theory, it might well be barred, after the Board had acted, from obtaining an adjudication on the remaining portions of the defendants' course of action, or from obtaining a form of relief—such as treble damages—peculiar to the antitrust laws. Certainly sound judicial administration would be offended by a rule which would necessitate the maintenance of two separate lawsuits; one before, one after the Board acted. Thus, the only appropriate conclusion was that the counterclaims, in their totality, could not be proceeded with before resort had been had to the Board.

Moreover, it was Toolco which recognized that its counterclaims were, at least certainly in dominant part, within the areas reserved to the Board. Certainly, if there were any particulars of its counterclaims that

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[12] "[T]he fact that different statutes are relied on does not render the claims different 'causes of action' . . . ." *Id.*, at 468.

were not dependent upon the outcome of proceedings before the Board, in the light of the fact that the dominant part of Toolco's counterclaims was within that jurisdiction, Toolco's decision not to go forward with its counterclaims[18] as a whole should have been respected by the District Court, and a dismissal without prejudice should have been the proper disposition, for reasons which we shall develop further at pp. 49-51, *infra*.

The purpose of a dismissal without prejudice is so that—if appropriate after the Board has acted—the counterclaims may be litigated in a posture in which they will in fact be within the jurisdiction of the courts. For example: (i) should the Board rule—and be

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[18] Respondents argued extensively to the Court of Appeals (Joint Ct. Apps. Br., pp. 25-27; see also Br. in Opp. to Cert., p. 27) that for some reason a party, in respect of a claim as to which he is plaintiff, cannot assert the supersession of the antitrust laws by a regulatory regime. But obviously so fundamental a matter touching the District Court's jurisdiction and the proper allocation of the functions between the courts and administrative agencies could be raised by either party or by the courts *sua sponte*. Toolco raised it promptly after this Court's decision in *Panagra*. Were it not for the fact that the position would have conflicted with that taken by TWA (controlled by them) as to the issues on the complaint, the lending institutions and other additional defendants might well have taken the position themselves that Toolco's counterclaims were not maintainable by reason of the Board's powers. Certainly the determination of the issue does not depend on the question of who raises it.

At the time the counterclaims were alleged, there was, of course, no way of knowing how the courts would rule on the jurisdictional questions inherent in the complaint. Obviously, Toolco, while taking the position that the matters embraced in the complaint were outside the District Court's jurisdiction, had to recognize that there might not be a final judicial determination in accordance with that view, and assert whatever counterclaims it had, even though they might be subject to objections comparable to the objections it was making to the complaint.

upheld upon any judicial review[14]—that the lending institutions are not engaged in a phase of aeronautics, their relationship to TWA would lie totally outside the purview of regulation under § 408, and the claims embraced in the counterclaims—except those for violation of the Federal Aviation Act, of course—could then be prosecuted. (ii) Should the Board hold that the lending institutions are engaged in a phase of aeronautics, and decline to approve the control relationship between them and TWA, Toolco then under the principles reaffirmed by this Court recently in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), could sue, as a stockholder of TWA, under the Federal Aviation Act; and of course its antitrust claims and other claims would then be maintainable.[15] (iii) Or, if the Board approved the control relationship but declined to approve certain aspects of its exercise a suit might then lie, under the authorities we have reviewed in our Brief in No. 443 (pp. 84-87), in respect of any of the unapproved matters which violated the law and which inflicted legal wrong upon Toolco.

In view of this, as we have demonstrated in our Brief in No. 443 (pp. 62, 84-87), the proper course would have been for the District Court to have dismissed the counterclaims for want of jurisdiction—the course that also should have been followed as to the issues raised by the complaint (apart, of course, from the question—not presented as to the counterclaims—that the conduct

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[14] See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 351, 353-54 (1963), for the factor of judicial review as confirming supersession here.

[15] It might well be, however, that the remedy of divestiture—except as to common law claims, or corporate law claims relating to the existence of the Voting Trust—would be exclusive to the Board. See our Brief in No. 443, p. 84.

charged in the complaint had been actually exempted.)[16] See *Panagra*, 371 U.S., at 313 n. 19; *Far East Conference* v. *United States*, 342 U.S. 570, 576-77 (1952); *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1932). This is because—as those cases teach—the cause of action has not matured until the administrative proceedings at the Board have been had; what is presented by the counterclaims is more than a simple case of concurrent jurisdiction between the Board and the courts.

While, to be sure, Toolco did not expressly request a dismissal without prejudice[17]—for reasons which will be developed further below, see pp. 53-54, *infra*—this disposition should, nonetheless, be the one made.

The reasons are several. In the first place, as the Court of Appeals apparently recognized as to the Second Counterclaim, the question is a "jurisdictional" one and must be considered by the court on its own motion, whether or not expressly presented by the parties. *Cf.* Fed. R. Civ. P. 12(h)(2). In the second place, since the question touches the proper judicial administration of the antitrust laws in an area where the precise articulation of powers between the courts and administrative agencies is essential, it is peculiarly a matter as to which the courts should follow the appropriate course without undue formalism, and if necessary, *sua sponte*. See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963) (reviewing issue of administrative supersession of antitrust laws despite abandonment of issue by parties); *Far East Confer-*

[16] As to this, dismissal of the complaint on the merits would appear appropriate.

[17] It did make request for "such other and further relief as to the Court may seem just and proper." See pp. 53-54 n. 1, *infra*.

ence v. *United States*, 342 U.S. 570, 572 (1952) (grant of common law writ of certiorari to review non-final judgment of District Court); *Panagra*, 371 U.S., at 331 (dissenting opinion). Accordingly, it is open to the Court to enter the order which best harmonizes the administrative and judicial regimes.

Finally, it was the position of the respondents that the order that should have been entered was a dismissal with prejudice; and it is the entry of this order by the District Court which is the reversible error of which petitioner now complains. Accordingly, as the Court of Appeals apparently recognized with respect to the Second Counterclaim, the entry of the dismissal with prejudice is fully reviewable, and on that review the appellate court has full powers to enter whatever order is appropriate.

* * * *

While on balance we submit that in the case of the counterclaims—as with respect to the "supersession" aspects[18] of our contentions addressed to the complaint (see our Brief in No. 443, pp. 86-87)—dismissal without prejudice was the proper disposition, there are certain differences between the posture of this case and of the issues presented by the complaint in No. 443, to which we desire to call the attention of the Court.

The fundamental difference is that the relationship between Toolco and TWA has been repeatedly found by the Board to be a relationship requiring regulation under § 408; this finding was made as early as the first Toolco-TWA control case in 1944, and reiterated as late as 1964 (even after the imposition of the Voting

[18] As opposed to our point (Brief, No. 443, pp. 62-83) that the transactions in question were exempted, as to which a dismissal on the merits would be appropriate. See p. 49 n. 16, *supra*.

Trust) by the Board. See *Hughes Tool Company*, Dkt. 1182, July 10, 1964, *reversed on other grounds sub nom. Trans World Airlines, Inc.* v. *CAB*, 2d. Cir., No. 29063, Dec. 7, 1964. On the other hand, the Board has never made the initial jurisdictional finding that the lending institutions are "engaged in a phase of aeronautics" upon which jurisdiction under § 408 is predicated—although the Board's Bureau of Economic Regulation has indicated that a substantial question is presented as to that status. The Court may wish to consider whether this distinction should lead to a conclusion that, while there was no jurisdiction in the District Court over the admittedly regulated relationship between Toolco and TWA, there was jurisdiction in the District Court over the counterclaims, at least to go so far as to hold the counterclaims on the docket of that court pending the Board's determination as to the existence of its jurisdiction under § 408.[19]

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[19] Furthermore, a difference in treatment (as to dismissal or stay) might be suggested by the fact that Toolco's common law claim for corporate mismanagement (the First Counterclaim) was alleged as an independent, state-created claim (rather than an ancillary, pendent jurisdiction claim, as was the state-created claim alleged in the complaint—the "third claim", paras. 65-70; A-28-29—which must fall if the two antitrust claims in the complaint are dismissed *in limine*). (See our Brief in No. 443, p. 100)

However, the Court's consideration of this factor must depend upon its disposition of No. 443. This is because the only basis of federal jurisdiction for the First Counterclaim was as a compulsory counterclaim to the complaint. Accordingly, if, as we contend in No. 443, the lender-management complaint against Toolco must be dismissed, the First Counterclaim would likewise have to be dismissed for want of jurisdiction. See 3 *Moore, Federal Practice* ¶ 13.15, p. 41 (1964); *Goldstone* v. *Payne*, 94 F. 2d 855 (2d Cir. 1938), *cert. denied*, 304 U.S. 585 (1938); *Manufacturers Cas. Ins. Co.* v. *Arapahoe Drilling Co.*, 267 F. 2d 5 (10th Cir. 1959). *Cf. Kelleam* v. *Maryland Casualty Co.*, 312 U.S. 377, 382 (1941). Any question as to granting a stay with respect to it would thus be precluded.

B. In Any Event, Because of the Meritorious Nature of Toolco's Claims, the Procedural Posture of the Case, and the Justification for Toolco's Position, It Was An Abuse of Discretion, If Not a Denial of Due Process, to Have Entered a Dismissal With Prejudice On Them

In the preceding section, we have demonstrated that the position by reason of which Toolco stopped litigating on the counterclaims—its position that judicial resolution of the issues sought to be raised by its counterclaims was superseded by the existence of the Board's regulatory powers—was correct. Accordingly, the default judgment was in error because a dismissal without prejudice for want of jurisdiction should have been entered. See also *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958).

But we further contend that even if this Court should hold that the District Court had jurisdiction over the counterclaims, it still amounted to a denial of due process—or at the least to an abuse of discretion which this Court should reverse—for the District Court not to have honored Toolco's decision to suspend prosecution of those counterclaims, and for it to have entered a dismissal of the counterclaims with prejudice, rather than a dismissal without prejudice. See *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

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Toolco indicated, when it moved for a stay, that it was ceasing all prosecution of its counterclaims until after the Board had made a determination on the complaint which Toolco had filed with the Board. Toolco's complaint was filed with the Board shortly after this Court's decision in *Panagra*, and shortly after replies to Toolco's counterclaims, in which they ascertain of the additional defendants had filed their

serted that their control over TWA had been approved by the Board under FAA § 408, and consequently bore the immunity provided in FAA § 414. (See, *e.g.*, B-64) Toolco did not, then, seek to continue litigating affirmatively while seeking to block the lending institutions and other additional defendants from continuing their discovery. Instead, it took the consistent overall position that, until the Board had acted, it did not "intend to pursue litigating" (AA-192) with respect to the counterclaims. It was thus withdrawing its counterclaims pending Board action; not admitting that its counterclaims lacked merit. See *Jefferson Amusement Co.* v. *FCC*, 226 F. 2d 277, 279 (D.C. Cir. 1955).

On February 8, 1963 Toolco reiterated its intention to suspend prosecution. The District Judge then flatly rejected Toolco's right to do this. He declared:

> "You don't have any control of that . . . . Once you initiated that proceeding by way of counterclaim and the defendants have their right to proceed, you cannot tell them to stop." (AA-192).

Since Toolco was affirmatively withdrawing prosecution of its claim in the District Court pending Board action, the District Court and the Court of Appeals should have considered whether a dismissal without prejudice ("non-suit") was appropriate. The District Court's position was, flatly, that Toolco had to continue to litigate on pain of having its claims dismissed with prejudice.[1]

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[1] The Court of Appeals, however, in affirming, took a totally different tack; it refused even to consider the appropriateness of such a disposition on the ground that Toolco did not request such relief. (332 F. 2d, at 613-14; R. 1432)

However, by reason of the proceedings on February 8 (*supra*, pp. 25-26), which (i) accelerated by ten days a hearing on Toolco's motion for a stay, (ii) denied the stay, (iii) established that the

We start with the general proposition that historically a plaintiff was master of his own action, and possessed "the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice [would] result to the defendant other than the mere prospect of a second litigation upon the subject matter." *Jones* v. *SEC*, 298 U.S. 1, 19 (1936). In the absence of "legal prejudice" to the defendant the right to dismiss was absolute. *In Re Skinner & Eddy Corp.*, 265 U.S. 86, 93 (1924). While Rule 41 of the Federal Rules of Civil Procedure regulates and permits the imposition of appropriate terms and conditions upon the taking of a non-suit by the plaintiff, it must

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District Court was of the view that Toolco had no right to stop prosecuting, and (iv) resulted in the District Judge inviting a motion for a dismissal with prejudice; there was neither opportunity for, nor purpose in, filing a separate formal motion for a non-suit under Rule 41(a). Toolco opposed a dismissal with prejudice. (f. 5128-36) Moreover, Toolco's motion for a stay requested that the Court grant "such other and further relief as to the Court may seem just and proper." (AA-263)

For the Court of Appeals to affirm the dismissal with prejudice, and at the same time to refuse to consider Toolco's contention that a non-suit should have been granted, because technically a motion had not been filed, was an unduly restrictive formalism, not in keeping with the spirit of the rules. *Cf. United States* v. *Arizona*, 346 U.S. 907 (1953), *reversing* 206 F.2d 159 (9th Cir. 1953); *Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142 (1st Cir. 1961), *cert. denied*, 368 U.S. 831 (1961).

The statement of the Court of Appeals (332 F.2d, at 615; R. 1432) that Toolco made a "business decision" to terminate all pre-trial discovery in order "to gain judicial review of the positions which the defendants had taken below" is in error. Toolco's "business decision" related to proceedings on the *complaint*. (B-178-79) The "business decision" referred to was totally unrelated to Toolco's position on the counterclaims. On the counterclaims, Toolco made a "legal decision" that it was entitled to suspend prosecution pending a determination by the Board.

be read against the backdrop of the prior practice.[2] See *Home Owners' Loan Corp.* v. *Huffman*, 134 F. 2d 314 (8th Cir. 1943).

We now analyze the complex of factors which made it an abuse of discretion to have entered an order barring Toolco's claims with prejudice, rather than one dismissing them without prejudice to their later prosecution.

These factors are three in number:

First.—The meritorious nature of Toolco's claims.

Second.—The procedural posture of the case, read in terms of Rule 41(a) of the Federal Rules of Civil Procedure, and the absence of any prejudice to the additional defendants in permitting Toolco a non-suit.

Third.—The substantial justification, in the light of the *Panagra* case and of the positions of the additional defendants, for Toolco's position that it and the other parties ought not be subjected to the enormous expense of continued prosecution of its counterclaims, until the issues relating to the Board's regulatory

[2] "All [decisions on motions under Rule 41(a)(2) or similar provisions] grant dismissal without prejudice and without imposition of terms other than the payment of taxable costs accrued to that stage of the proceedings where the only prejudice to the defendant would be the possibility of a second lawsuit, which is not considered legal prejudice; all impose such terms and conditions as are necessary to protect the defendant's rights where the defendant would be prejudiced beyond the possibility of merely another suit; and all would deny the application where the imposition of terms and conditions would not fully protect the defendant's substantive rights." *Annotation, Construction, as to Terms and Conditions, of Rule or Statute Providing for Voluntary Dismissal without Prejudice*, 21 A.L.R. 2d 627, 629 (1952).

powers over the matters raised in those counterclaims had been resolved.

First.—The probable merit of Toolco's counterclaims.—Certainly, in making the overall determination whether a voluntary dismissal or a dismissal with prejudice was appropriate, the likelihood of merit in Toolco's counterclaims should be considered. Relevant to the probable merit of Toolco's claims are the following admitted or hardly disputable facts:

(1) The dominant position of Equitable and Metropolitan in the supplying of senior long-term equipment financing to the major airlines of the United States. Equitable and Metropolitan have admitted that, at December 31, 1960, their total investment in air carriers exceeded $476 million. (See p. 7, *supra*.)

(2) In connection with the allegations that TWA was wrongfully being engrossed as a "captive market" for additional financing by the respondents, the fact that after the Voting Trust was created the lenders entered into an additional $147 million of financing with TWA, subject to a provision that all of this additional indebtedness could be accelerated by the lenders in the event of the termination of the Voting Trust (see, *e.g.*, B-66); and the rejection of offers by Toolco to furnish $100 million additional equity financing if the Voting Trust were terminated. (See, *e.g.*, B-80-81)

(3) The interlocks between Metropolitan, one of the promoters of the Voting Trust, and TWA's principal transatlantic competitor, Pan American World Airways. Juan D. Trippe, chief executive of Pan American, and two other executives of Pan American, are

directors of Metropolitan.[3] In 1962, TWA made a proposal to dispose of its highly profitable international business to Pan American through sale or merger. (See AA-158)

These factors, together with the behavior of the respondents in precipitately insisting upon the Voting Trust[4] and upon the enormous premium of 22% on the prepayment of the notes necessary to terminate the Voting Trust, and the discussion which we have quoted from a former CAB member (n. 8, pp. 38-39, *supra*), all suggest that Toolco's counterclaims were meritorious. Certainly this factor should have been taken into account in the determination whether a dismissal with

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[3] Toolco's complaint to the Board complained of the conduct of Pan American and Trippe. It brought to the attention of the Board that Pan Am was TWA's principal international competition; that Trippe was one of the organizers of Pan Am and dominated the affairs of Pan Am; that Trippe was also a director and member of the finance committee of Metropolitan Life Insurance Co., which had seized control of TWA, with the other lending institutions, by the transactions of December 1960 and had also insisted on the 22% premium as the price of Toolco's termination of the Voting Trust; that two other individuals were also directors of both Pan Am and Metropolitan; that Pan Am had repeatedly sought to remove TWA as an international competitor; and that the lender-controlled management of TWA and Pan Am, with the active support of Metropolitan, had entered into merger negotiations in 1962 under which Toolco would be permanently eliminated as the controlling shareholder of the resulting airline. Toolco asked the Board to investigate, *inter alia*, whether this conduct involving Pan Am and Trippe constituted acquisition of common control of TWA and Pan Am and interlocking relationships which had not been approved by the Board, as well as unfair methods of competition. (AA-149-50, 155-56, 158, 160-61)

[4] "Hughes was given until 5:00 Eastern Daylight Savings Time to make up his mind." See n. 8, pp. 8-9, *supra*.

prejudice, or the withdrawal of its claims for future prosecution, which Toolco proposed, was indicated.

Second—The Procedural Posture of the Case.— (1) Under Rule 41(a)(1) and (c) a claimant has an absolute right to a non-suit at any time before a responsive pleading or a motion for summary judgment has been served. Additional defendant Tillinghast and TWA did not serve their replies until after Toolco announced its decision to abandon prosecution of its action in the District Court pending a Board determination. Accordingly, Toolco was absolutely entitled to a dismissal without prejudice as to them.

(2) Under Rule 41(a)(2) and (c) a claimant may have a non-suit after a reply has been served "upon such terms and conditions as the court deems proper." In *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (8th Cir., 1943),[5] the court held that a dismissal without prejudice was appropriate even after the case had been tried, appealed by defendant, reversed with direction to grant defendant a new trial, certiorari denied and the mandate of the Court of Appeals issued. In construing Rule 41(a)(2) the court said:

> "The rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs and when the defendant will not be subjected thereby to some plain legal prejudice beyond the incidental annoyance (as distinguished from prejudice) of a second litigation upon the same subject matter . . . [citing cases]

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[5] Cited with approval by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 n. 5 (1947).

> "Since rule 41 is declaratory of a long established practice in the courts and is intended only to clarify and make definite that practice, it should be construed with reference to the precedents . . . [T]he question to be determined upon appeal from an order granting a dismissal without prejudice after trial at the instance of the plaintiff is: 'Did defendant lose any substantial right by the dismissal?' " 134 F. 2d, at 317.

Accordingly, in order to prevent the issuance of a non-suit the additional defendants must show that they "would suffer some plain legal prejudice other than the mere prospect of a second lawsuit." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947); *Texaco, Inc.* v. *Harrison*, 30 F.R.D. 127 (E.D.Pa. 1962).[6]

In this case no prejudice whatever, and certainly no "legal prejudice," has been suffered by the additional defendants by reason of the pendency of the counterclaims. The earliest replies to the counterclaims were not received until January 25, 1963. Accordingly, until that date Toolco had an absolute right to a dismissal without prejudice as to all additional defendants under Rule 41(a)(1) and 41(c). Nothing occurred in the eight business days between January

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[6] That a defendant has been obliged to employ counsel or to file an answer, *Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 147 (1st Cir. 1961), *cert. denied*, 368 U.S. 831 (1961), or that he has been obliged to produce documents in pre-trial or be orally examined, *United States* v. *E. I. DuPont de Nemours & Co.*, 13 F.R.D. 490 (N.D. Ill. 1953), or indeed that he may have gone through the entire trial and appeal of a case, *Home Owners' Loan Corp.* v. *Huffman*, *supra*, is not "legal prejudice" sufficient to prevent a claimant from taking a non-suit.

25 and February 6, 1963, the date the Toolco motion for a stay was made, which affected the rights or the position of the additional defendants in any respect, so as to justify a denial of a non-suit. The additional defendants have made no assertion to the contrary, nor have they contended that upon the commencement of a second action they would suffer "legal prejudice".

The additional defendants claimed below that they suffered prejudice as a result of the pendency of the counterclaims only by reason of (i) their participation in the oral discovery proceedings conducted by Toolco before the Special Master, and (ii) the requirement that they produce documents for inspection and copying by Toolco. Assuming, *arguendo*, that the burden of participating in pre-trial procedures were sufficient to deprive a plaintiff of the right to a non-suit,[7] nevertheless the record will not support a finding that the additional defendants have suffered any burden here *by reason of the pendency of the counterclaims.*

(i) Toolco was not permitted on deposition to inquire with respect to the issues of the counterclaims. The District Court had ordered in March 1962 that Toolco's priority of discovery was to be limited to the issues of the complaint and that no discovery could be had by Toolco with respect to the issues of the counterclaims until after TWA had completed its discovery and all the additional defendants had completed theirs.

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[7] But see *United States* v. *E. I. DuPont de Nemours & Co., supra; Home Owners' Loan Corp.* v. *Huffman, supra.* It would appear that this matter is one on which adequate protection could certainly be given a defendant through the imposition of appropriate "terms and conditions."

The Special Master enforced this ruling. (B-306-07) Accordingly, not one additional defendant was examined on deposition nor was any witness examined with respect to the issues of the counterclaims. Moreover, no cross-examination whatever was conducted by any additional defendant of any witness Toolco had deposed.[8]

(ii) The additional defendants also complain of having been required to produce documents to Toolco. But the fact is that the documents produced were documents called for by the subpoenas *duces tecum* Toolco had served on them as non-party witnesses prior to the filing of the counterclaims and which were sought in connection with *discovery on the complaint*. The additional defendants would have been required to produce these documents whether or not counterclaims had ever been filed by Toolco. If Toolco had waited to file its counterclaims until after it had obtained documentary production from the additional defendants pursuant to its subpoenas *duces tecum*, there could be no assertion

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[8] The additional defendants did attend each session before the Special Master and participated to the extent of engaging in a series of procedural maneuvers. However, that attendance was a burden they gratuitously assumed which is not chargeable to Toolco.

Any assertion by the additional defendants that their attendance at deposition was not voluntary but was somehow chargeable to Toolco because the Special Master ruled that they would be bound by the depositions ignores (i) that the Special Master was not authorized to rule on that question, (ii) that the Special Master was cognizant that the question was ultimately one for the court and expressly stated that he was not purporting to rule on the question, and (iii) that since the depositions were limited to the issues of the complaint there was nothing occurring which could bind them. (R. 984, 1072).

that their production of documents should bar a dismissal without prejudice.[9]

* * * *

If there was any question as to whether the additional defendants would have suffered prejudice by a non-suit, the District Court should have inquired carefully as to the availability of the device of imposing appropriate additional[10] "terms and conditions" under Rule 41(a)(2) on the non-suit, so as adequately to protect the additional defendants. No analysis was made as to this matter.

Third.—The Justification for the Suspension of Litigation on the Counterclaims.—The seriousness of the

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[9] That Toolco filed its counterclaims promptly, and thereby gave the prospective witnesses the protection afforded parties by the Rules, should not redound to Toolco's detriment.—Before Toolco filed its counterclaims it had the right, under the orders of the District Court, to depose as witnesses on the issues of the complaint—prior to any deposition discovery by TWA—all the persons named as additional defendants. The District Court directed it to file its answer prior to taking such depositions. (A-140) Toolco gained no advantage by reason of the fact that the additional defendants were parties.

On the contrary: By filing its counterclaims in February 1962 Toolco gave the additional defendants the advantage of documentary production of over 325,000 pages of documents from Toolco to which they would otherwise not have been entitled and an opportunity to assert rights as parties rather than the more limited rights of witnesses.

[10] The fact that Toolco had already submitted the matters in question to the Board, in fact probably fulfilled the necessary "terms and conditions" that should have been imposed under Rule 41(a)(2). *Cf. Klar* v. *Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D.N.Y. 1953). The District Court, of course, could also have imposed a condition as to the prompt prosecution of the complaint before the Board, or other appropriate terms, if it was so advised. Toolco asked the Board, in fact, to expedite consideration of its complaint. (AA-160)

question which Toolco sought to raise by the position which it took on the counterclaims must be borne in mind in determining the propriety of the granting of a voluntary dismissal without prejudice. Toolco's complaint was filed with the Board within a few weeks of this Court's decision in *Panagra* which cast new light on the relationship between the regulatory powers of the Board and the jurisdiction of the courts in anti-trust cases. It was filed shortly after the additional defendants took the position that the Board had approved their control over TWA.

The burden imposed upon Toolco, and the other parties, with respect to pre-trial discovery on the counterclaims was potentially enormous, both in terms of expense and of inconvenience. All, or a major part, of this discovery would be for naught if the matters embraced in the counterclaims—or a material part of them—were not presently the proper subject of an action in court. Accordingly, Toolco, in accordance with the position as to the law which it took with respect to the issues presented by TWA's complaint (the subject of No. 443 in this Court) suspended proceedings on the counterclaims and declined to proceed further, until the matters embraced by its complaint before the Board had been adjudicated in that forum.[11]

Certainly, the position taken by Toolco has substantial merit, even if despite our contentions it should be rejected by this Court. The Board's Bureau of

[11] Even where the plaintiff wishes to change forums merely as a matter of convenience, a non-suit is permitted in the absence of a showing of prejudice to the defendant. See *e.g.*, *Alamance Industries, Inc.* v. *Filene's*, 291 F.2d 142, 146 (1st Cir. 1961), *cert. denied*, 368 U.S. 831 (1961); *Standard National Insurance Company* v. *Bayless*, 272 F.2d 185 (5th Cir. 1959); *Sahutsky* v. *National Dairy Products Corp.*, 184 F. Supp. 68 (E.D. Pa. 1960).

Economic Regulation, at the time a hearing on Toolco's complaint was ordered, observed that the issues raised in that complaint gave reasons to believe that violations of law by the defendants on the counterclaims existed. Moreover, the substantiality of the issues posed by Toolco as to the supersession of the jurisdiction of the courts by the regulatory regime of the Board where issues touching a control relationship regulated under § 408 are concerned has been underscored by this Court by granting Toolco's Petition for Certiorari in No. 443,[12] as well as in the instant case. Even if the District Court had jurisdiction, certainly there are substantial aspects of Toolco's counterclaims as to which a reference to the Board, and determinations by it, would have been either essential or desirable.

* * * *

For these reasons, Toolco should have been permitted to withdraw prosecution of its counterclaims. The District Court should have borne in mind the absence of substantial legal prejudice to the additional defendants, and should have put a higher weight on the justification for Toolco's decision to cease prosecution of its counterclaims. Toolco's refusal to proceed further with its counterclaims accordingly should have been respected.

The Court of Appeals erred, in any event, in failing to recognize:

(a) That even if Toolco did not have the right to suspend prosecution of its counterclaims for the reasons

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[12] The Court of Appeals rejected the contentions of Toolco as to supersession of its counterclaims "in the light of the views we have above expressed regarding the first appeal" (No. 443). (332 F.2d, at 613; R. 1432)

stated at pp. 52-64, *supra*, there was no basis for imposing punitive sanctions against Toolco,[13] and that respondents were entitled only to such remedial relief as they could justify. See *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209-10 (1958).

(b) That the District Court had failed to hold any hearings and had failed to require the respondents to specify the nature of the detriment, if any, they suffered as a result of Toolco's suspension of prosecution. Cf. *Von Der Heydt* v. *Rogers*, 251 F. 2d 17 (D.C. Cir. 1958).

(c) That the record would not support a finding that respondents suffered any detriment by reason of the pendency of the counterclaims, particularly since no discovery was permitted to be conducted with respect to the issues of the counterclaims—the discovery taking place in the action being, by order of the District Court, enforced by the Special Master, limited to the issues of the complaint; (see, *e.g.*, B-306-07) and

(d) That petitioner was not afforded an opportunity to be heard as to the nature or scope of the relief, if any, necessary to the protection of respondents in the light of Toolco's decision to cease prosecuting the counterclaims.

Notwithstanding that absolutely no analysis was made of what remedial relief, if any, was appropriate under the circumstances, the court applied the most serious sanction available—dismissal with prejudice. This was, at the least, an abuse of discretion which this Court should reverse, if not a denial of due process. See *Societe Internationale* v. *Rogers*, *supra*.

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[13] And clearly there was no basis for imposing punitive sanctions against TWA, on whose behalf the derivative counterclaim was being asserted.

The Court of Appeals appears to have affirmed the dismissal with prejudice as a sanction under Rule 37 on the ground that Toolco failed to make discovery. (332 F. 2d, at 614-15; R. 1432-35) Even on that basis, however, it was incumbent upon the District Court to make a meticulous analysis of the prejudice caused respondents by the conduct of petitioner and to give petitioner an opportunity to be heard on the question of that prejudice, before determining the nature of the remedial relief which might be appropriate. See *Independent Productions Corp.* v. *Loew's, Incorporated,* 30 F.R.D. 337 (S.D.N.Y. 1962); *Von Der Heydt* v. *Rogers, supra;* Wright, *Discovery,* 35 F.R.D. 39, 96 (1964). Instead the District Court made but a perfunctory cross-reference to the proceedings on the complaint.

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The Court of Appeals also erroneously concluded (332 F. 2d, at 615; R. 1435) that Toolco had waived its attorney-client privilege by filing with the Board, in another proceeding, an affidavit of Raymond A. Cook, one of Toolco's attorneys, which paralleled the allegations set forth in the counterclaims.[14] (AA-241-62) However, that affidavit does not reveal confidential communications between attorney and client but, rather, sets forth information received by the attorney from third parties and events he observed. In any event, even if the affidavit could be construed as raising a question of fact as to the source of the information disclosed therein, there should have been a hearing to determine the factual question before the court con-

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[14] The Court of Appeals did not appear to rely on this point in affirming the dismissal with prejudice. (332 F.2d, at 615; R. 1435)

cluded—we submit erroneously—that the affidavit in fact disclosed information obtained by the attorney from his client. No such hearing was held.

II. IT WAS IMPROPER TO DISMISS WITH PREJUDICE THE DERIVATIVE COUNTERCLAIM WITHOUT NOTICE TO STOCKHOLDERS PURSUANT TO RULE 23(c).

The Court of Appeals affirmed without qualification the dismissal with prejudice of the Third Counterclaim, which is a derivative claim asserted on behalf of TWA and which seeks substantial damages and injunctive relief on behalf of TWA. Even if a dismissal with prejudice of the other counterclaims could be justified on the record, no justification exists for barring TWA or other stockholders of TWA from maintaining an action based on conduct alleged to have injured TWA. At the least, notice to stockholders pursuant to Rule 23(c) should have been given before a dismissal with prejudice of the derivative counterclaim.

To be sure, under Rule 23(c) notice to stockholders is not an essential condition to a dismissal after a hearing on the merits.[1] However, here no hearing on the merits was ever held. The claim was dismissed, rather, not because of any adverse determination on the merits, but because of conduct which was attributed to Toolco, the stockholder which had brought the derivative claim. But the notice requirement of Rule 23(c) was designed to prevent prejudice to the other stockholders resulting from the acts of the class representative. See *Winkelman* v. *General Motors Corp.*, 39

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[1] See, e.g., *Mullins* v. *De Soto Securities Co.*, 45 F. Supp. 871, 886 (W.D. La. 1942), *rev'd in part on other grounds*, 136 F.2d 55 (5th Cir. 1943).

F. Supp. 826, 831 (S.D.N.Y. 1940).[2] The vital need for such notice arises from the fact that a dismissal with prejudice may bar or present an impediment to a subsequent action by a minority shareholder. The court must be "guardian of absent parties and of the corporation as a whole."[3] *Heddendorf* v. *Goldfine*, 167 F. Supp. 915, 926 (D. Mass. 1958). Accordingly, it should be held here that a dismissal with prejudice could not have been entered without compliance with the Rule 23(c) notice procedure.

Whether the Court of Appeals or the District Court intended to bar a subsequent action by a minority shareholder of TWA is not clear from the decisions rendered and the Court of Appeals declined to clarify its opinion when asked to do so in Toolco's petition for rehearing. (R. 1447-49, 1455-56) But Rule 41(b) provides that "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . operates as an adjudication upon the merits." Accordingly, the possibility exists that TWA, under a management free of lender control—or a minority shareholder of TWA—might find that a court would hold that the claim of TWA was barred by reason of the dismissal with prejudice. There is no reason to saddle the minority stockholders of TWA with the consequences of Toolco's actions in

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[2] Furthermore, a determination that notice to stockholders is not required where a derivative claim is dismissed with prejudice under Rule 37 would suggest the possibility of collusively avoiding the protective features of Rule 23(c) by failure to comply with a discovery order. *Cf. Certain-Teed Products Corp.* v. *Topping*, 171 F.2d 241, 243 (2d Cir. 1948).

[3] *Cf.* McLaughlin, *Capacity of Plaintiff Stockholder to Terminate a Stockholder's Suit*, 46 Yale L.J. 421, 432-35 (1936); N.Y. Leg. Doc. (1942), No. 65(j), 1942 Report, Recommendations and Studies of the Law Revision Comm'n, pp. 471-563.

the lawsuit. Accordingly, for the protection of TWA and its minority stockholders, this Court, if it holds against Toolco on its other contentions, should modify the decision and the judgment of the District Court so that a minority stockholder may maintain the derivative claim on behalf of TWA.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals, affirming the dismissal of the counterclaims with prejudice, should be reversed.

Respectfully submitted,

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APPENDIX

Relevant Statutes and Rules

I. The following is the text of Sections 102, 408, 411 and 414, Federal Aviation Act (49 U.S.C. §§ 1302, 1378, 1381 and 1384):

§ 102. CONSIDERATION OF MATTERS IN PUBLIC INTEREST BY BOARD

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adopted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

§ 408. CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL —PROHIBITED ACTS

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, or any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

APPLICATION TO BOARD; HEARING; APPROVAL; DISPOSAL WITHOUT HEARING

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquistion of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application

does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

INTERESTS IN GROUND FACILITIES

(c) The provisions of this section and section 1379 of this title shall not apply with respect to the acquistion or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

JURISDICTION OF ACCOUNTS OF NONCARRIERS

(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

INVESTIGATION OF VIOLATIONS

(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision.

§ 411. METHODS OF COMPETITION

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

§ 414. LEGAL RESTRAINTS

Any person affected by any order made under sections 408, 409 or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

II. Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) provide as follows:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

III. Sections 4 and 7 of the Clayton Act (15 U.S.C. §§ 15 and 18) provide as follows:

§ 4. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

§ 7. ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisi-

tion may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

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Nothing contained in this section shall be held to effect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commis-

sion in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

IV. The following is the text of Rules 23(a) and (c), 37 and 41 of the Federal Rules of the Civil Procedure:

RULE 23. CLASS ACTIONS.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, each of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

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(c) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) REFUSAL TO ANSWER. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing

for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal To Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuine-

ness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) FAILURE TO RESPOND TO LETTERS ROGATORY. A subpoena may be issued as provided in Title 28, U.S.C., § 1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

RULE 41. DISMISSAL OF ACTIONS.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated

in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction

or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.